Supreme Court, U. S.
FILED
SEP 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1978 TERM

NO. 78-5422

FEDERICO GONZALEZ,

Appellant,

-against-

NEW YORK.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT.

JURISDICTIONAL STATEMENT

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IN THE

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JURISDICTIONAL STATEMENT

Federico Gonzalez, appellant herein, respectfully appeals from a judgment of the Appellate Division of the Supreme Court of New York, Second Department, entered May 8, 1978, affirming a judgment of the Supreme Court, Kings County, rendered on July 30, 1975, convicting him of criminal possession of a dangerous drug in the third degree [formerly New York Penal Law §220.20 (McKinney, 1972)] and sentencing him to an indeterminate term of imprisonment with a maximum of five years. Appellant submits this statement to show that this Court has jurisdiction of this appeal and that a substantial question is presented.

CITATION TO OPINION BELOW

The affirmance by the Appellate Division, Second Department, merely citing New York Criminal Procedure Law Sections 140.15(4) and 120.80(5) as an opinion, is not yet officially reported. The order of affirmance is annexed as Appendix A. Leave to appeal to the New York Court of Appeals was denied on June 21, 1978, by Chief Judge Charles D. Breitel. A copy of the certificate denying leave to appeal to the Court of Appeals is annexed as Appendix B. The trial court's written opinion denying appellant's motion to suppress is annexed as Appendix C.

JURISDICTION

The judgment and order of the Appellate Division was entered on May 8, 1978. Leave to appeal to the Court of Appeals was denied on June 21, 1978.

A notice of appeal to this Court was filed in the Supreme Court, Kings County, the court possessed of the record, on September 15, 1978. The notice of appeal is annexed as Appendix D. This Court's appellate jurisdiction is invoked under 28 U.S.C. §1257(2). The following decisions sustain the jurisdiction of the Court to review the judgment of the New York Court of Appeals. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n. 3 (1963); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-90 (1921).

QUESTION PRESENTED

Whether Section 140.15(4) of the New York Criminal Procedure Law which authorizes the police to make warrantless arrests of a person within a home is, as applied to this case, violative of the Fourth and Fourteenth Amendments.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV, XIV.

STATUTES INVOLVED

New York Criminal Procedure Law, Section 140.15(4):

Arrest without a warrant; when and how made by police officer.

* * *

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80 [relating to matters of notice to occupants before entry], if he were attempting to make such arrest pursuant to a warrant of arrest.

STATEMENT OF THE CASE

Appellant and his three co-defendants, Anthony Lugo, Julio Tablas, and Carlotta Verges, were arrested within an apartment and indicted in three counts charging criminal sale and possession of a dangerous drug in the first degree and conspiracy in the third degree.* A joint motion by appellant and Lugo to suppress the cocaine which was seized in the apartment pursuant to the arrests was denied on May 19, 1975.

At the suppression hearing, the People's witnesses testified that the arrests of appellant and his co-defendants on December 14, 1972 were the culmination of an undercover drug investigation begun in October, 1972 which had already produced several small cocaine sales by Tablas to an undercover officer, Detective Saul Rodriguez. Rodriguez had previously arranged to purchase approximately one-half kilogram of cocaine from Tablas, and by 2:50 P.M. on December 13, 1972, in anticipation of the sale, he and his field team (consisting of at least ten officers) had positioned themselves in the vicinity of 17 Woodhull Street, where the arrests were to occur. Throughout the afternoon and early evening, Detective Rodriguez, Tablas, and Verges met several times to discuss the upcoming sale: at one point, Rodriguez heard Verges tell Tablas "Freddy" could get the cocaine. Rodriguez met his field team at least once in their office to explain that a delay was necessary to arrange the sale.

At 9:05 P.M., Rodriguez entered the second-floor apartment at 17 Woodhull Street pursuant to an arrangement with Tablas and Verges to discuss the cocaine sale with them and with appellant and Lugo, whom he was meeting for the first time. Appellant displayed and offered to sell to Detective Rodriguez a package containing one-eighth kilogram of cocaine,

* New York Penal Law: formerly §§220.44 and 220.23 (McKinney, 1972); §105.05.

but Rodriguez demanded five-eighths kilogram,* and was told to return in "about one hour and forty-five minutes."

Rodriguez left the apartment at 10:10 P.M., and informed the field team in his office that the cocaine would be at the apartment when he returned. Police Officer John Keller and a portion of the field team returned to the vicinity of 17 Woodhull Street at 11:45 P.M., having made no effort to obtain a warrant either for the arrest of the four co-defendants or to search the apartment.** When Rodriguez returned to the apartment at 12:15 A.M., December 14, 1972, he was shown five-eighths kilogram of cocaine, including the original one-eighth kilogram package.

Tablas and Rodriguez left the apartment to get the purchase money. Once outside the building, Rodriguez gave the field team a pre-arranged signal which directed them to enter the apartment to make the arrests and to seize the cocaine which they would find within. The field team burst into the building while Rodriguez and Tablas were still standing in the hallway. In the ensuing effort to arrest Tablas, Rodriguez' gun was discharged. The officers announced their purpose and demanded to be let into the apartment. When there was no response, they smashed down the door with a sledgehammer and entered at 12:55 A.M.

Appellant was immediately arrested within the bathroom, and a bag of cocaine seized from the running toilet. The officers then opened the bedroom door, arrested Lugo, and seized from beneath the bed a foil packet containing a white

* Sale of 1/8 kilogram (approximately 4 1/2 ounces) was then a Class C felony [formerly New York Penal Law §220.35 (McKinney, 1972)], punishable by a maximum of fifteen years [New York Penal Law §70.00]. Sale of 5/8 kilogram (approximately 22 ounces) was then a Class A felony [formerly New York Penal Law §220.44 (McKinney, 1972)], punishable by a mandatory maximum of life imprisonment [formerly New York Penal Law §70.00 (McKinney, 1967)].

** Keller attempted to excuse this failure by claiming that, up until the last moment, it was only a possibility, not a certainty, that the sale would occur within the apartment.

substance. Verges was arrested within the kitchen. Although it does not appear from the record whether any contraband other than that mentioned above was found or seized, a complete and thorough warrantless search of the apartment was made after the co-defendants were removed.

The court denied the motion to suppress, concluding, first, that the officers had probable cause to effect the arrests, and second, that in order to prevent the destruction of contraband, the forced, warrantless entry into the defendants' dwelling was appropriate and lawful (App. C). Appellant pleaded guilty to criminal possession of a dangerous drug in the third degree [formerly New York Penal Law §220.20 (McKinney, 1972)] on June 10, 1975, and was sentenced on July 30, 1975 to an indeterminate period of imprisonment not to exceed five years.*

By virtue of New York Criminal Procedure Law §710.70(2), appellant's plea of guilty did not waive his Fourth Amendment claim. He accordingly appealed the denial of his motion to suppress, and challenged the constitutional validity of C.P.L. §140.15(4) which authorized his warrantless arrest within the apartment. The Appellate Division, Second Department, affirmed the conviction on May 8, 1978, stating merely that the judgment of July 30, 1975 was "affirmed (see C.P.L. §140.15, subd. 4, 120.80 subd. 5)" (App. A). Leave to appeal to the Court of Appeals was denied on June 21, 1978 (App. B).

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented in this case is whether, in the absence of any exception to the Fourth Amendment's warrant requirement, police officers may enter a dwelling without a

* Appellant remains incarcerated pursuant to this judgment, concurrently with two concurrent fifteen year to life sentences imposed by the Appellate Division, Second Department, (modifying the two concurrent twenty-five year to life sentences imposed by the Supreme Court of New York, Kings County, on July 21, 1976). ___ A.D.2d ___, 2d Dept., N.Y.L.J., p. 16, col. 2, July 13, 1978.

warrant to effect the arrest of a person who is lawfully within it. The issue is posed squarely here, because the police made a warrantless arrest of appellant in an apartment in which he was legitimately present in the complete absence of any emergency and after the passage of at least two hours during which they could have obtained a warrant for his arrest. The question thus presented merits full consideration by this Court both because of its intrinsic importance and because of the sharp split of authority among state and federal courts on its proper resolution.

This Court has never decided whether warrants are required for arrests in the home, but has recognized the substantial nature of the issue by reserving it in a number of recent cases in which it was not precisely presented. See United States v. Santana, 427 U.S. 38 (1976); id. at 45 (Marshall, J., dissenting); United States v. Watson, 423 U.S. 411, 418 n. 6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n. 13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971); Jones v. United States, 357 U.S. 493, 499-500 (1958). The issue is important because it involves the two fundamental interests protected by the Fourth Amendment, privacy of the home and security of the person. In all other Fourth Amendment cases involving intrusions on the privacy of the home, this Court has held the intrusion to be strictly regulated by the warrant requirement. Nonetheless, the New York Supreme Court, Appellate Division, relying upon C.P.L. §140.15(4), New York's warrantless arrest statute, affirmed the trial court's ruling that the forcible, warrantless entry by the police to seize appellant was proper. This interpretation of the Fourth Amendment thus affords more protection to the citizen against unreasonable invasions of his home to seize his property than it affords against invasions to seize his very person. Because of the anomaly in this construction of the Fourth Amendment, and because of the fundamental interests at stake, this case deserves plenary review.

The decision of the Appellate Division is in conflict with the holdings of most courts, both state and federal, which have considered this question. Most significantly, that court's decision conflicts with the decision of the Court of Appeals for the Second Circuit in United States v. Reed, 572 F.2d 412 (2nd Cir. 1978) holding that warrants are required, absent exigent circumstances, for felony arrests in the home. Such nonuniformity of Fourth Amendment rulings by the federal and state courts in New York has obvious undesirable effects on the administration of justice and requires resolution. Mincey v. Arizona, 98 S. Ct. 2408, 2419 (Marshall, J., concurring).

The Appellate Division's decision conflicts not only with the holding of the Second Circuit, but also with the holdings of all but one other circuit to have considered the question. In the leading case, the District of Columbia Circuit held that warrants were necessary for home arrests, Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), and subsequently, four other circuits have followed. Vance v. North Carolina, 432 F.2d 984, 990-91 (4th Cir. 1970); United States v. Shye, 492 F.2d 886, 891-93 (6th Cir. 1974); Salvador v. United States, 505 F.2d 1348, 1351-52 (8th Cir. 1974); United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974). Only the Seventh Circuit has held to the contrary. United States ex rel. Wright v. Woods, 432 F.2d 1143 (7th Cir. 1970), cert. denied, 401 U.S. 966 (1971).

Among state courts, too, the larger number to have considered the question have taken the position that warrants are required for arrests in the home. See State v. Cook, 115 Ariz. 188, 564 P.2d 877 (1977); People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal.Rptr. 629 (In Banc), cert. denied, 429 U.S. 929 (1976); People v. Moreno, 176 Colo. 488, 491 P.2d 575 (1971); Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975); Laasch v. State, ___ Wis. ___, 23 Cr. L.

Rep. 2404 (August 9, 1978); but see, State v. Perez, 277 So. 2d 778 (Fla.), cert. denied, 414 U.S. 1064 (1973); People v. Eddington, 23 Mich. App. 210, 173 N.W.2d 686 (1970), aff'd, 387 Mich. 551, 198 N.W.2d 297 (1972); People v. Payton, 45 N.Y.2d 300 (1978). Of course, a large number of states, like New York, have statutes which authorize warrantless arrests in the home. See ALI Model Code of Pre-Arraignment Procedure, Appendix XI at 696 (1975). Although the Appellate Division and the New York Court of Appeals [in People v. Payton, 45 N.Y.2d 300 (1978)] have upheld the validity of this statute, the constitutionality of the statute and the similar ones in other states remains in doubt due to the substantial body of case law to the contrary. Accordingly, the question of the validity of the New York statute which authorizes warrantless arrests within a dwelling is of substantial constitutional dimension and should be granted plenary review.

CONCLUSION

FOR THE ABOVE REASONS, THE QUESTION PRESENTED IS SUBSTANTIAL, MERITING REVIEW.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
Counsel for Appellant

BRENT K. OLSSON
Of Counsel
September, 1978

of the State of New York, Second Judicial Department,
held in Kings County on May 8, 1978

HON. J. IRWIN SHAPIRO, Justice Presiding
HON. JOHN P. COHALAN, JR.,
HON. CHARLES MARGETT,
HON. FRANK D. O'CONNOR, } *Associate Justices*

The People of the State of New York,

Respondent,

v.

Federico Gonzalez,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Federico Gonzalez,

defendant in this action, having appealed to this court from a judgment of the Supreme

Court, Kings County, rendered July 30, 1975;

and the said appeal having been argued by Diana Budzanoski,

Esq., of counsel for the appellant, and argued by Peter Weinstein, Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed (see CPL 140.15, subd. 4, 120.80, subd. 5).

Enter:

IRVING H. SAXON

Clerk of the Appellate Division

APPENDIX A

B/mc

AD2d

A - April 24, 1978

866 E The People, etc., respondent,
v Federico Gonzalez, appellant.

Martin Erdmann and William E. Hellerstein, New York, N.Y. (Brent Olsson and Diana Budzanoski of counsel), for appellant.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Peter Weinstein of counsel), for respondent.

Judgment of the Supreme Court, Kings County (D'AMARO, J.), rendered July 30, 1975, affirmed (see CPL 140.15, subd. 4, 120.80, subd. 5).

SHAPIRO, J.P., COHALAN, MARGETT and O'CONNOR, JJ., concur.

May 8, 1978 PEOPLE v GONZALEZ, FEDERICO 866 E

[illegible] COUNSEL IS REQUIRED TO NOTIFY [illegible] IMMEDIATELY OF THE DISPOSITION [illegible]

APPENDIX A-2

State of New York
Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

FEDERICO GONZALEZ,
Defendant-Appellant.

CERTIFICATE DENYING LEAVE

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
June 21, 1978

Charles D. Breitel
Chief Judge

William E. Hellerstein, Esq.
Legal Aid Society
15 Park Row
New York, New York 10038

Hon. Eugene Gold
District Attorney, Kings County
400 Municipal Bldg.
Brooklyn, New York 11201

Clerk, Court of Appeals

*Description of Order: 5-8-75 App Div 2 affmd. 7-30-75 Sup. Ct., Kings Co.

APPENDIX B

FORM 81

MEMORANDUM

SUPREME COURT KINGS COUNTY (CRIMINAL TERM, PART 26)

PEOPLE OF THE STATE OF NEW YORK

vs.

ANTHONY LUGO and FEDERICO GONZALEZ

By D'AMARO J.

Dated May 19, 1975

Indictment No. 11682/1972

Defendants moved to suppress the use of one-half kilogram of cocaine as evidence on the trial of their indictment for criminal sale of a dangerous drug in the first degree and other related charges. At the hearing on this motion, held on April 8, 9, and 10, 1975, the defendants did not testify, nor did they produce any witnesses.

The cumulative testimony of the People's witnesses, Officer Keller, one of the arresting officers, and Officer Rodriguez, the undercover agent, elicited the following facts.

Findings of Fact

On December 13, 1972, an undercover police officer made contact with one Julio Tables for the purchase of approximately one-half kilogram of cocaine for the sum of approximately $10,000.

The aforesaid Tables was previously known to the undercover police officer from whom he had made previous purchases of narcotic drugs. The undercover police officer was under constant observation by members of a back-up team to whom he periodically made reports as to the progress of the operation during the course of that day. The undercover police officer was given $10,000 and wired to transmit conversations to the back-up team.

APPENDIX C

During a second meeting that day the undercover officer and Tables were joined by one Carlotta Burgess. They proceeded to drive around while being followed by the back-up team, and finally went into a bar. They subsequently came out and went into 17 Woodhall Street at approximately 9:00 p.m. The undercover officer there met the defendants herein and a quantity of cocaine was shown to the officer. He advised them that he wanted more than the amount shown to him. Price was discussed, and it was agreed that the officer would return later with the money.

The officer then conferred with the back-up team and advised them of all of the foregoing. He then returned to 17 Woodhall Street at approximately 12:15 a.m. on December 14, 1972, wired for transmission and followed by the back-up team. While in the apartment he weighed the cocaine and then said he would have to return to his car to get the money. He was accompanied by Tables. He took a package from his car, and as he was returning to the building, upon a pre-arranged signal, the back-up team started to close in. The undercover officer struggled with Tables and fired a shot. Within 30 seconds thereafter the back-up team entered the building. He advised them that the "stuff" was still up in the apartment and the others were still there. The officers raced upstairs and announced through the closed door of the apartment that they were the police. They then proceeded to break the door down with a sledge hammer. Upon entering the apartment they observed the defendant Gonzalez flushing the cocaine down the toilet. In another room they found the defendant Lugo and a quantity of white substance in a tin foil near the bed.

Conclusions

The fundamental issue on the question of suppression of evidence is the legality of its seizure, which in turn depends upon the existence of probable cause for the arrest to which the seizure is incidental. Was the arresting officer, Keller, in possession of sufficient information (supplied to him principally by his superior officers and the undercover police officer, Rodriguez) to have acted upon more than mere suspicion AND UPON PROBABLE CAUSE when he, and the other arresting officers, broke into defendants' apartment, arrested the defendants, and seized the cocaine.

This court must reply in the affirmative.

The fact that Officer Keller did not personally observe the "buy," or the cocaine, is not requisite to his determination that he had probable cause to arrest.

Although hearsay as to Keller, the knowledge imparted to him through his brother officer Rodriguez and the radio communications of his superiors was collectively sufficient for him to conclude that the crime had been committed and that the defendants and the contraband were within the apartment designated (see People v. Coffey, 12 N Y 2d 443, and People v. Horowitz, 21 N Y 2d 55).

The testimony of Rodriguez clearly supported the veracity of the information supplied to Keller. He actually participated in the arrangements to buy the cocaine, actually observed the defendants, their apartment, and the cocaine. Accordingly, the tests of sufficiency, dependability, and accuracy of the information

upon which Keller and the other arresting officers made the arrest and seizure, were amply met.

The final matter to be disposed of relates to the entry into the apartment and seizure of the cocaine without a warrant.

There is ample authority to support the proposition that, in order to prevent the destruction of contraband, the forced entry into defendants' dwelling is appropriate and lawful (People v. Floyd, 26 N Y 2d 558; U.S. v. Rabinowitz, 339 U.S. 56). In view of the clear and convincing weight of the testimony elicited by the People at the hearing, and the principles of law enunciated herein, the motion to suppress the evidence obtained by the police is hereby denied. This decision constitutes the order of the court.

Robert R. Lewis

J. S. C.

APPENDIX C-4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- FEDERICO GONZALEZ, Appellant.	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES IND. NO. 11682/72

S I R S :

PLEASE TAKE NOTICE that FEDERICO GONZALEZ, the abovenamed appellant, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of New York, Appellate Division, Second Department, entered on May 8, 1978, affirming a judgment of the Supreme Court, Kings County, rendered on July 30, 1975, convicting appellant of the crime of criminal possession of a dangerous drug in the third degree [formerly P.L. 6220.10], and sentencing him to an indeterminate period of imprisonment with a maximum of five years.

This appeal is taken pursuant to 28U.S.C. §1257(2).

Dated: New York, New York
September 14, 1978

Yours, etc.,

WILLIAM E. HELLERSTEIN
BRENT K. OLSSON
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TO:- HON. EUGENE GOLD
District Attorney, Kings County
Attn: A.D.A. Peter Weinstein
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CLERK
Supreme Court, Kings County
360 Adams Street
Brooklyn, New York 11201

APPENDIX D

NOV 3 PAGE 7

Supreme Court, U. S.
FILED
OCT 23 1978
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78 - 5422

FEDERICO GONZALEZ,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

On Appeal from the Supreme Court of the State of New York, Appellate Division, Second Department.

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MOTION TO DISMISS OR AFFIRM

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EUGENE GOLD
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Kings County
210 Joralemon Street
Brooklyn, New York 11201

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78 - 5422

FEDERICO GONZALEZ,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

On Appeal from the Supreme Court of the State of New York, Appellate Division, Second Department.

MOTION TO DISMISS OR AFFIRM

BRIEF FOR APPELLEE

MOTION

Appellee in the above-entitled case moves to dismiss or affirm the judgment of the Supreme Court of the State of New York, Appellate Division, Second Department, on the ground that the question presented is so insubstantial as not to need any further argument.

QUESTION PRESENTED

Is an arrest warrant constitutionally required to enter premises, on which a suspect is lawfully present, for the purpose of effecting an arrest where there are exigent circumstances present and the police had no prior opportunity to obtain such a warrant for the particular crime for which the suspect is to be arrested?

STATE STATUTES INVOLVED

Section 140.10 (1) (b) of the New York Criminal Procedure Law provides that a police officer may arrest a person for a "crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise."

Section 140.15(4) provides: "In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

PROCEEDINGS BELOW

By Kings County Indictment Number 11682/1972, appellant herein was accused of Criminal Sale of a Dangerous Drug in the First Degree (formerly New York Penal Law § 220.44

[McKinney 1972]) and other related charges. Pursuant to a motion by appellant to suppress a quantity of cocaine seized at the time of his arrest, a suppression hearing was held by New York State Supreme Court Justice Paul D'Amaro on April 8-9, 1975. By a written opinion dated May 19, 1975, appellant's motion was denied. Thereafter, on June 10, 1975, appellant entered a plea of guilty to Criminal Possession of a Dangerous Drug in the Third Degree (formerly Penal Law § 220.20 [McKinney 1972]) in satisfaction of the entire indictment. Appellant was sentenced on July 30, 1975, to an indeterminate term of imprisonment of not more than five years.

Appellant's conviction was challenged in the New York State Supreme Court, Appellate Division, Second Department, on the ground that his arrest and the seizure of the drugs were made in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution. The conviction was unanimously affirmed in a decision and order dated May 8, 1978. Leave to appeal to the New York Court of Appeals was denied on June 21, 1978, by Chief Judge Charles D. Breitel.

Thereafter, a motion was made by appellant in the Appellate Division for an order amending the remittitur of the Appellate Division to read that upon the appeal there was presented and necessarily passed upon a question under the Fourth and Fourteenth Amendments to the Constitution of the United States.

The motion was unanimously denied. A copy of the Court's decision denying the motion appears herein as Appendix A.

STATEMENT OF FACTS

The indictment arose from an undercover purchase of narcotics by Detective Saul Rodriguez of the New York City Police Department which took place during the early morning hours of December 14, 1972. Only minutes after the sale, appellant and two of his three accomplices were arrested when Detective Rodriguez, aided by his police back-up team, re-entered the premises where the sale had just occurred without an arrest warrant and seized narcotics found therein. The following testimony was elicited from the two witnesses to testify at the supression hearing:

For at least one year prior to December 14, 1972, Detective Rodriguez, acting in an undercover capacity, had regularly discussed and engaged in small purchases of narcotics from one Julio Tablas, a co-defendant of appellant. Thus, in October, 1972, the police began a field team narcotics operation by observing the encounters between Rodriguez and Tablas. Finally, arrangements were discussed between them for a large purchase of cocaine to be made on December 13, 1972.

At about 2:50 p.m. on that day, Detective Rodriguez was wired for sound and followed by his back-up team to the corner of Columbia and Union Streets in Brooklyn. There he encountered Tablas and discussed with him the purchase of approximately

five-eighths of one kilogram of cocaine. Tablas, however, informed the undercover officer that there would be a delay and directed him to return later.

Under the scrutiny of his field team, Rodriguez next met with Tablas at 5:00 p.m. At that time, Tablas, Carlotta Verges (another co-defendant), and Detective Rodriguez drove around the neighborhood until about 8:00 p.m. discussing the proposed buy. They agreed to meet again one hour later.

At 9:00 p.m., Detective Rodriguez arrived at 17 Woodhall Street as directed and was admitted. Present in the room were Tablas, Verges, Anthony Lugo (another co-defendant), and appellant who showed Detective Rodriguez a brown paper bag which appellant claimed contained an eighth of one kilogram of cocaine. Rodriquez, however, stated that was insufficient as he wanted to purchase a total of five-eighths of one kilogram. Appellant replied that he could get it but that it would take some time -- "about one hour and forty-five minutes." The undercover officer then left the apartment at about 10:20 p.m. and went back to his office.

At 12:15 a.m., Detective Rodriguez returned to the apartment as arranged. The requested cocaine was shown to the officer who then stated he would go outside to his car to get his money. Detective Rodriguez, however, was accompanied by Julio Tablas. Outside the apartment, Rodriguez signalled his back-up team that the sale had occurred and that they should follow him into the building to assist in the arrest. Upon

re-entering the building, Rodriguez shouted "Police" and attempted to arrest Tablas. A brief struggle ensued during which the officer's gun was fired.

Rodriguez and his fellow officers then proceeded up to the apartment and announced their presence. When no one inside responded, they gained entry by breaking down the door. Once inside the apartment, the police arrested appellant who was found standing over the toilet which had been flushed. Seized from the bottom of the toilet bowl was a paper bag containing the cocaine.

THE ISSUE PRESENTED BY THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The issue which appellant attempted to raise in the lower courts and presently is attempting to renew before this Court is whether the Fourth Amendment requires the police in the absence of exigent circumstances to obtain an arrest warrant before entering premises in which a suspect is lawfully present to effect the suspect's arrest. Admittedly, this might pose a substantial federal question as it is an issue to which this Court has alluded in several cases but has never expressly decided. See, e.g., United States v. Santana, 427 U.S. 38, 43-44 (1976) (White, J., concurring); Id. at 45 (Marshall, J., dissenting); United States v. Watson 423 U.S. 411, 418 n. 6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n.

13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 480-481 (1971). Moreover, it is an issue which has left the various state and federal courts that have considered it in conflict. Compare United States v. Reed, 572 F.2d 412 (2d Cir. 1978), with United States ex rel Wright v. Woods, 432 F. 2d 1143 (7th Cir. 1970), cert. denied, 401 U.S. 966 (1971). Compare People v. Payton, 45 N.Y. 2d 300 (1978), with People v. Ramey, 16 Cal. 3d 263, 545 P. 2d 1333, cert. denied, 429 U.S. 929 (1976). However, the issue as framed by appellant is not truly presented by the facts of the instant case. Rather, the issue properly presented by this case is whether the police should be required to obtain an arrest warrant as soon as they have probable cause to arrest a suspect during an ongoing investigation where the arrest would be for a different, and less serious, crime than that being investigated. Appellee respectfully submits that there is no such requirement and that there is not a substantial federal question presented by this case meriting any further review by this Court.

The underlying rationale of appellant's legal thesis is that the police had probable cause to arrest appellant for Criminally Selling a Dangerous Drug in the Third Degree, a C felony (formerly Penal Law § 220.35) -- a less serious crime than that which was investigated and eventually charged against appellant -- as early as 9:00 p.m. on December 13, 1972, when Detective Rodriguez was offered for sale by appellant an eighth of one kilogram of cocaine. Therefore, appellant

argues, the police should have obtained an arrest warrant charging appellant with this lesser crime before returning to the apartment later evening.*

What appellant conveniently ignores is that the police did not have probable cause, and therefore could not have gotten an arrest warrant, for the actual prospective crime being investigated -- Criminally Selling a Dangerous Drug in the First Degree, an A felony (formerly Penal Law § 220.44) -- until the undercover officer returned to the apartment around midnight. At that point, there was not a sufficient opportunity to get a warrant as there were exigent circumstances present that necessitated the responsive action taken by the police, to wit: the destructive nature of the drugs left inside the apartment when the undercover officer left to notify his back-up team (Vale v. Louisiana, 399 U.S. 30, 35 [1971]; Johnson v. United States, 333 U.S. 10, 15 [1948]), and the firing of Detective Rodriguez's gun during the arrest of co-defendant Tablas which must have alerted the others including appellant inside the apartment to the presence of alien

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* It should be noted that the record below is absolutely barren of any evidence that an arrest warrant could have been obtained even during the period that appellant claims that the police had a duty to obtain such a warrant. Rodriguez did not leave the apartment until about 10:20 p.m. and returned by 12:15 a.m. After an allowance for travelling time to and from the apartment and time spent updating the field team, there would have been much less than two hours to obtain such a warrant.

interests (Warden v. Hayden, 387 U.S. 294, 297-298 [1967]).*

We submit that appellant's contention that the police were obligated to obtain an arrest warrant in this case because of their knowledge of appellant's illegal possession, and offer to sale, of a lesser quantity of drugs is wholly without merit. Appellant's argument when stripped to its necessary implications is that he had a right to be arrested for a crime before the culmination of an ongoing police investigation and fruition of the specific, more serious, crime being investigated -- a principle firmly denounced by this Court in United States v. Lovasco, 431 U.S. 783 (1977).

The inherent weakness in appellant's argument becomes apparent upon examination of the following hypothetical: Suppose Detective Rodriguez and his field team had gotten a warrant for appellant's arrest for his participation in the lesser offense but upon arrival at the apartment were informed that there would be another delay in the sale of the cocaine sought.** The police would then be confronted with two

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* It is important to note that appellant has not attempted to argue before this Court or below that the occurrences immediately preceding appellant's arrest were not exigent circumstances. Appellant has attempted to bypass this issue by maintaining -- erroneously, we believe -- that the police were obligated to obtain an arrest warrant before the undercover officer's return to the apartment which culminated in the sale of cocaine and appellant's arrest.

** There was testimony at the suppression hearing that one of the reasons why a warrant was not obtained was that the police were not sure that the sale would actually occur that night.

equally unsatisfactory options: 1) They could execute the arrest warrant thereby prematurely terminating the investigation before the case had ripened to the level for which the investigation was originally initiated, or 2) the officers could delay their arrest until the contemplated crime was completed -- if ever.

Appellee respectfully submits that requiring the police to follow the first of these alternatives would place a serious -- if not totally incapacitating -- restriction on police undercover investigations.* As stated by Mr. Justice Powell in his concurring opinion in United States v. Watson, supra at 831: "Good police practice often requires postponing an arrest, even after probable cause had been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury."

The second alternative course would be equally unfavorable as it would require the officers to ignore the warrant -- a court order to effect the arrest. Moreover, appellant would probably then be heard to complain that the intentional delay of his arrest which resulted in more serious charges against appellant violated his right of due process under the Fifth and Fourteenth Amendments. See United States v. Marion, 404

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* The irrationality of appellant's position becomes even clearer when one realizes that the police had probable cause to arrest co-defendant Tablas long before December 14, 1972. Were the police required to obtain a warrant and effect an immediate arrest of Tablas they would never even have met appellant.

U.S. 307 (1971). Appellant cannot have it both ways. The police should be entitled to pursue their investigation to its maturity without having to choose between two such undesirable courses of action.

Thus, appellant has misconstrued the issue by raising the broad question of whether an arrest warrant is required to effect an arrest of one lawfully on private property. The issue actually presented by this case is whether the police needed to obtain an arrest warrant to re-enter the premises and arrest appellant after the completed sale of cocaine in light of the above-mentioned exigent circumstances existing at that time. This Court has repeatedly held that exigent circumstances will justify a warrantless entry into a private place to effect an otherwise lawful arrest. See, e.g., United States v. Santana, 427 U.S. 38 (1978); Coolidge v. New Hampshire 403 U.S. 443, 474-478(1971); Warden v. Hayden, 387 U.S. 294 (1966). No case by this Court has ever held or implied differently. Accordingly, when the issue is properly viewed from this perspective, the reasons for the Appellate Division's unanimous denial of appellant's motion for an amended remittitur become apparent as there was no substantial federal question needed to be reviewed in this case.

CONCLUSION

Wherefore, appellee respectfully submits that the question presented by this appeal is so unsubstantial as not to need any

further argument, and apellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of conviction.

Dated: Brooklyn, New York
October, 1978

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

PETER WEINSTEIN
Assistant District Attorney
On the Motion

APPENDIX A

No. 4791

The People, etc., respondent,
v Federico Gonzalez, appellant.

Motion by appellant to amend the remittitur of this court by amending its decision and order both dated May 8, 1978 so as to say that the court passed upon a certain question under the Constitution of the United States, in the consideration of his appeal from a judgment of the Supreme Court, Kings County, rendered July 30, 1975.

Motion denied.

SHAPIRO, J.P., COHALAN, MARGETT and O'CONNOR, JJ., concur.